STATE OF MICHIGAN

COURT OF APPEALS

YOLANDA HARDY and PAUL HARDY, Plaintiffs-Appellants,	UNPUBLISHED April 17, 2007
v	No. 272962 Oakland Circuit Court
SAFEWAY FOOD CENTER, INC., Defendant-Appellee.	LC No. 05-068918-NO

Before: Wilder, P.J., and Sawyer and Davis, JJ.

PER CURIAM.

Plaintiffs appeal as of right an order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

Plaintiffs' sole contention on appeal is that the trial court erred when it granted defendant's motion for summary disposition given that the milk crate in defendant's aisle upon which plaintiff, Yolanda Hardy (hereinafter plaintiff), tripped was not open and obvious.

On appeal, this Court reviews a trial court's decision on a motion for summary disposition de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion brought pursuant to MCR 2.116(C)(10) should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Miller v Purcell*, 246 Mich App 244, 246; 631 NW2d 760 (2001). When the burden of proof at trial would rest on the nonmoving party, the nonmovant may not rest upon mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996); *PT Today, Inc v Comm'r of Financial & Ins Services*, 270 Mich App 110, 150; 715 NW2d 398 (2006). A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds could differ. *West v GMC*, 469 Mich 177, 183; 665 NW2d 468 (2003). When deciding a motion for summary disposition, a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004).

In a premises liability action, the plaintiff must prove the elements of negligence: (1) that defendant had a duty to plaintiff, (2) the defendant breached that duty, (3) an injury proximately resulted from that breach, and (4) the plaintiff suffered damages. *Taylor v Laban*, 241 Mich App 449, 452-453; 616 NW2d 229 (2000). Different standards of care are owed to a plaintiff in

accordance with the plaintiff's status on the land. A person entering upon the property of another for a reason directly connected to the landowner's commercial business interest is an invitee. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596-597; 614 NW2d 88 (2000), on rem 243 Mich App 461; 646 NW2d 427 (2000). An invitor has a common-law duty to exercise reasonable care to protect an invitee from an unreasonable risk of harm caused by a dangerous condition on the land. *Lugo v Ameritech*, 464 Mich 512, 516; 629 NW2d 384 (2001).

The basic duty to protect or warn an invitee does not generally include removal of open and obvious dangers: "where the dangers are known to the invitee or are so obvious that the invitee might reasonably be expected to discover them, an invitor owes no duty to protect or warn the invitee unless he should anticipate the harm despite knowledge of it on behalf of the invitee." *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992). Whether a danger is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered the danger upon casual inspection. *Teufel v Watkins*, 267 Mich App 425, 427; 705 NW2d 164 (2005). The test is objective and the court should look to whether a reasonable person in the plaintiff's position would foresee the danger, not whether a particular plaintiff should have known that the condition was hazardous. *Corey v Davenport College of Business (On Remand)*, 251 Mich App 1, 5; 649 NW2d 392 (2002).

If, however, there are "special aspects" of a condition that make even an "open and obvious" condition "unreasonably dangerous," the invitor retains the duty to undertake reasonable precautions to protect invitees from such danger. *Mann v Shusteric Enterprises*, 470 Mich 320, 328-329; 683 NW2d 573 (2004). In determining whether a danger presents an unreasonable risk of harm despite being open and obvious, a court must consider whether special aspects exist, such as a condition which is unavoidable or which poses an unreasonably high risk of severe injury. *Lugo*, *supra* at 516-517. The determination must be based on the nature of the condition at issue, and not on the degree of care used by the invitee. *Lugo*, *supra* at 523-524. The *Lugo* Court provided two examples of situations that might involve special aspects and present "an unreasonable risk of harm" despite their open and obvious character: a commercial building with only one exit for the general public where the floor is covered with standing water, and an unguarded 30 foot deep pit in the middle of a parking lot. *Lugo, supra* at 518.

Here, plaintiff tripped on an empty milk crate in the aisle of defendant's store as she stepped backward after retrieving a two-liter of pop from the shelf. Plaintiff concedes that she never looked behind her prior to stepping backward and tripping on the milk crate. The danger presented by the crate could be considered open and obvious if it was reasonable to expect that an average person with ordinary intelligence would have discovered it upon casual inspection. *Teufel, supra* at 427. The record is devoid of evidence suggesting that the crate was not open and obvious. The crate was black, and the floor under it was white. Such a contrast served to increase the crate's visibility. Additionally, the crate was unobscured by items or persons; it simply lay in plain view on the other side of the aisle, up against the bread shelf. Although plaintiff suggests that the crate was not open and obvious because it was placed behind her after she turned her back to get the pop, this contention is unsupported by the evidence. Dorell VanHorn, defendant's employee, testified that he left the crate up against the bread shelf, and Christopher Haynes, another of defendant's employees, who actually witnessed the accident, confirmed that the crate was up against the bread shelf as plaintiff tripped on it. Plaintiff herself admits that she did not see the crate until after her fall. Therefore, she has no personal

knowledge with respect to where it was prior to her fall. Given that both of plaintiff's feet became entangled with the crate during her fall, it can be presumed that the crate was not in the same place pre-fall as it was post-fall, when plaintiff first saw it.

In any event, whether the crate was at the edge of the aisle and touching the bread shelf or in the middle of the aisle due to someone having moved it there after plaintiff turned her back, the danger presented by the crate was nonetheless open and obvious. A reasonable person in plaintiff's position, after taking an item off of the shelf, would look back – if only casually and for a brief moment – before taking a step backward. Had plaintiff looked back before stepping back, she would have seen the crate, whether it was in the middle of the aisle or at the edge of the aisle. Plaintiffs contend that requiring someone in plaintiff's position to look back before stepping back is tantamount to requiring her to check for hidden dangers every time she moves. This is not so. Requiring plaintiff to glance behind her before moving in a backwards direction is not unreasonable, unduly burdensome or by any means a novel proposition. See *Bertrand v Alan Ford, Inc*, 449 Mich 606, 611; 537 NW2d 185 (1995) (where the object that caused the injury created a risk of harm solely because the plaintiff failed to notice it, the open and obvious doctrine eliminates liability if the plaintiff should have discovered it and realized its danger).

Next is the determination whether there were any special aspects of the crate which would impose a duty on defendant despite the open and obvious nature of the danger. The special aspects determination must be based on the nature of the condition at issue, and not on the degree of care used by the invitee. *Lugo, supra* at 523-524. With regard to proving unavoidability, plaintiffs have a difficult time making this showing. Had plaintiff taken a quick look behind her before stepping back from the pop shelf, she would have seen the crate and simply stepped over it or around it. It was by no means unavoidable. The aisle was six feet wide and the crate was a box-like object with the capacity to hold four quarts of milk. There was ample room to maneuver around the crate, had plaintiff taken care to look in its direction and become aware of it. In fact, VanHorn testified that as he sat on the crate and straightened out the bread, customers had no difficulty walking to and fro behind him.

Moreover, plaintiff cannot show that the crate posed an unreasonably high risk of severe injury. Although the crate may have posed some risk of injury, the type of danger contemplated by *Lugo* is of a different nature. The critical inquiry is whether there is something unusual about the crate, which because of its character, location, or surrounding conditions gives rise to an unreasonable risk of harm. *Bertrand, supra* at 617. When analyzing whether an ordinary pothole in a parking lot could give rise to an unreasonable risk of harm, the *Lugo* Court concluded, "there is little risk of severe harm. Unlike falling an extended distance, it cannot be expected that a typical person tripping on a pothole and falling to the ground would suffer severe injury." *Lugo, supra* at 520. Similarly, the crate in the instant case cannot be considered to have given rise to an unreasonably high risk of severe injury. Accordingly, plaintiffs' premises liability claim is barred by the open and obvious danger doctrine as the milk crate was an open and obvious danger possessing no special aspects.

Affirmed.

/s/ Kurtis T. Wilder
/s/ David H. Sawyer
/s/ Alton T. Davis